Ho Hup Construction Co Bhd v Government of Madagascar and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1031 OF 2006
JAMES FOONG, ABDULL HAMID EMBONG AND WAN ADNAN MUHAMAD JJCA
23 JULY 2009

Banking — Guarantee and indemnity — Performance guarantee — Whether payable without proof of any default — Whether payment may be stopped pending arbitration — Whether principal can make demand based on guarantee

Constitutional Law — Suit involving government or ruler — Immunity of sovereign — Contractual claim against Government of Madagascar — Whether maintainable

Contract — Guarantee — Performance guarantee — Whether payable without proof of any default — Whether payment may be stopped pending arbitration — Whether principal can make demand based on guarantee

The appellant entered into three contracts for the construction and rehabilitation of roads in Madagascar. These contracts were entered between the appellant and the Vice Premature In Charge of Economic Programmed, Ministry of Transport, Public Works and Land Development, Madagascar (the 'Vice Premature'). Pursuant to its obligation under the contracts, the appellant requested Bumiputra Commerce Bank Bhd ('the bank') to issue various bank guarantees as security for the performance of its work under the contracts. A dispute arose between the Vice Premature and the appellant over the performance of the contracts that resulted in the termination of the contracts by the Vice Premature. The appellant sought to refer to the dispute to arbitration and filed this originating summons against the bank claiming, inter alia, injunctive relief to prevent payment under the bank Guarantees pending the trial or arbitration of its disputes with the Vice Premature. The appellant claimed that the Government of Madagascar and its Ministry of Public Works, Transport and Meteorology were not beneficiaries under the bank guarantees. According to the appellant, the beneficiary under the said guarantee was the Vice Premature. The appellant also contended that the Government of Madagascar failed to establish that the Republic of Madagascar is a foreign Sovereign recognised by our Yang di-Pertuan Agong. The appellant filed this appeal against the decision of the High Court dismissing the appellant's

application for interlocutory injunctive relief and application for leave to adduce further evidence.

Held, dismissing the appeals with costs:

(1) The performance guarantee was payable without proof of any default on the appellant's part (see para 16).

(2) The demands for payment under the performance guarantees were valid and effective and were made by the Minister of Public Works and Transport as agent of the Government of Madagascar, a party of the contract entered into with the appellant upon which the performance guarantees in question were issued. In law, the principal can act against the agent to make a demand on the guarantee (see para 22(a)).

(3) On the issue of sovereign immunity, the appellant had entered into the contracts with the Government of Madagascar with eyes wide open and full knowledge of its sovereign status (see para 22(b)).

[Bahasa Malaysia summary

Perayu telah menandatangani tiga kontrak untuk pembinaan dan pemuliharaan jalan-jalan di Madagascar. Kontrak-kontrak ini telah ditandatangani di antara perayu dan *Vice Premature* bertanggungjawab terhadap program ekonomi, Kementerian Pengangkutan, Kerja-Kerja Awam dan Pembangunan Tanah, Madagascar (the '*Vice Premature*'). Menurut kewajipannya di bawah kontrak-kontrak, perayu telah memohon Bumiputra Commerce Bank Bhd ('bank tersebut') untuk mengeluarkan pelbagai gerenti bank sebagai jaminan untuk pelaksanaan kerja-kerja di bawah kontrak-kontrak tersebut. Pertikaian timbul di antara *Vice Premature* dan perayu mengenai pelaksanaan kontrak-kontrak tersebut yang mana membawa kepada penamatan kontrak oleh *Vice Premature*. Perayu memohon untuk merujuk pertikaian tersebut kepada timbang tara dan memfailkan saman pemula ini terhadap bank menuntut, antara lain, relief injunksi untuk menghalang bayaran di bawah gerenti-gerenti bank menunggu perbicaraan atau timbang tara pertikaiannya dengan *Vice Premature*. Perayu mendakwa bahawa Kerajaan Madagascar dan Kementerian Kerja-Kerja Awam, Pengangkutan dan Meteorologi bukan benefisiari di bawah gerenti-gerenti bank tersebut. Mengikut perayu, benefisiari di bawah gerenti tersebut ialah *Vice Premature*. Perayu juga berhujah bahawa Kerajaan Madagascar gagal untuk membuktikan bahawa Republik Madagascar adalah pemerintah asing yang diiktiraf oleh Yang di-Pertuan Agong. Perayu memfailkan rayuan ini terhadap keputusan Mahkamah Tinggi menolak permohonan perayu untuk relief injunksi interlokutori dan permohonan kebenaran untuk mengemukakan keterangan selanjutnya.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Pelaksanaan gerenti perlu dibayar tanpa bukti untuk sebarang keingkaran daripada pihak perayu (lihat perenggan 16).

(2) Tuntutan untuk bayaran di bawah pelaksanaan gerenti adalah sah dan efektif dan telah dibuat oleh Menteri Kerja-Kerja Awam dan Pengangkutan sebagai ejen untuk Kerajaan Madagascar, pihak kepada kontrak yang ditandatangani dengan perayu di mana pelaksanaan gerenti-gerenti tersebut telah dikeluarkan (lihat perenggan 22(a)).

(3) Mengenai isu kekebalan pemerintah, perayu telah menandatangani kontrak-kontrak tersebut dengan Kerajaan Madagascar dengan penuh teliti dan mempunyai pengetahuan penuh tentang status kedaulatannya (lihat perenggan 22(b)).]

Notes

For cases on immunity of sovereign, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2412–2413.

For cases on performance guarantee under banking, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2428–2430.

For cases on performance guarantee under contract, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4147–4151.

Appeal from: Originating Summons No D5–24–93 of 2006 (High Court, Kuala Lumpur)

M Nagarajah (Jasbeer Singh and Gerard Lourdesamy with him) (Jasbeer Nor & Lee) for the appellant.

V Vijaykumar (Albar & Partners) for the first respondent.

WSW Davidson (Y Ramachandran and Marion Qua with him) (Azman Davidson & Co) for the second respondent.

Wan Adnan Muhamad JCA (delivering judgment of the court):

[1] These two appeals (W-02–1031 of 2006 and W-02–341 of 2006) arose from the same suit. At the request of the parties, the appeals were heard together. These are appeals against the decision of the learned judge of the High Court dismissing the appellant's application for interlocutory injunctive relief application for leave for the appellant to adduce further evidence and application to add Government of Madagascar as a party to the originating summons.

[2] The factual background can be stated briefly as follows.

[3] The appellant entered into three contracts for the construction and rehabilitation of roads in Madagascar. These contracts are numerically numbered Contract No 410/SEP, Contract No 411/SEP and Contract No 412/SEP ('contracts'). These contracts were entered between the appellant and

A the Vice Premature in Charge of Economic Programmed, Ministry of Transport, Public Works and Land Development, Madagascar (the 'Vice Premature').

B **[4]** Pursuant to its obligation under the contracts, the appellant requested Bumiputra Commerce Bank Bhd ('the first respondent') to issue various bank guarantees as security for the performance of its work under the contracts. The appellant's cause of action is based on these guarantees.

C **[5]** A dispute has arisen between the Vice Premature and the appellant over the performance of the contracts that resulted in the termination of the contracts by the Vice Premature on the 13 February 2006. The appellant had invoked the dispute resolution provisions in the contracts and as such any difference or dispute between the parties should be referred to arbitration under the Rules of the International Chamber of Commerce.

D

[6] The appellant filed an originating summons dated 21 March 2006 against the first respondent bank claiming, inter alia, declaratory relief that the Bank guarantees were conditional guarantees. The appellant also sought injunctive relief to prevent payment under the bank guarantees pending the E trial or arbitration of its disputes with the Vice Premature. Neither the Government of Madagascar nor the Vice Premature was named as a party in the originating summons.

F **[7]** At the same time the originating summons was filed, the appellant filed a summons in chambers application seeking interlocutory injunctive relief to restrain payment of the bank guarantees pending judgment or any further order.

G **[8]** On 31 March 2006, the High Court granted the appellant an ad interim injunction pending the hearing of its summons in chambers for injunctive relief. This order was extended on 25 March 2006.

[9] Subsequent to the filing of the originating summons and the summons in H chambers application for injunctive relief and the granting of the two ad interim injunction orders, the Government of Madagascar (the second respondent) demanded payment under the bank guarantees. The first respondent advised the second respondent's solicitor that it was unable to make payment under the bank guarantees because of the existence of the ad interim I injunction orders.

[10] As a consequence of the appellant's failure to name the Vice Premature or the Government of Madagascar as a party to the originating summons, the Government of Madagascar filed a summons in chambers application on 25

July 2006 to be added as a party to the originating summons to ensure that its interests under the bank guarantees and contracts were protected. This application also sought the High Court's leave to enable the Government of Madagascar to respond to the appellant's summons in chambers application for injunctive relief.

[11] On 22 September 2006 the High Court allowed the Government of Madagascar's application to be added as a party to the originating summons and to be allowed the right to respond to the appellant's summons in chambers application for injunctive relief. This is the subject of Civil Appeal No W-02–1031 of 2006.

[12] In the course of proceedings for the appellant's summons in chambers application for injunctive relief, the appellant filed three consecutive summons in chambers applications to adduce further evidence. The first was withdrawn after the Government of Madagascar agreed to allow the appellant to file a further affidavit. However, the Government of Madagascar opposed the appellant's subsequent two summons in chambers applications.

[13] On 13 April 2007 the High Court dismissed the appellant's summons in chambers application for interlocutory injunctive relief and the appellant's two outstanding summons in chambers applications to adduce further evidence. The ad interim injunction preventing payment under the bank guarantees was also dissolved at the same time.

[14] The appellant claims that the bank guarantees were conditional guarantees and as such it would be unconscionable or unfair for the Government of Madagascar to make a call on the guarantees while the underlying dispute between the parties to the contracts has yet to be determined in the arbitration proceedings before the ICC.

[15] The respondent contended the appellant's claims are baseless. The operative parts of performance guarantee No TF001G917960 and performance guarantee No TF001G917962 are worded virtually identically, the only significant differences being the amount claimed in each guarantee and their respective expiry dates. The guarantee is worded in the following way:

> At the request of the Contractor, we BUMIPUTRA-COMMERCE BANK BERHAD of Trade Services Centre, Level 5, No. 6, Jalan Tun Perak, 50050 Kuala Lumpur, Malaysia hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of United State Dollars: Three Million Five Hundred Fifty Two Thousand (USD3,552,983.57) only such sum being payable upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligations under the Contract, without *your needing to prove or to show grounds for your demand or the sum specified therein*.

A ...

This guarantee is subject to the Uniform Rules of Demand Guarantees, ICC Publications No. 458, except that subparagraph (ii) of Sub-article 20(a) is hereby excluded. This guarantee shall be governed by and construed in accordance with the laws of Malaysia.

B

[16] It is clear from reading of the extract from performance guarantee No TF001G917960 set out above that it is payable without proof of any default on the appellant's part.

C

[17] As well as being governed by Malaysian law, the performance guarantee are also subject to the International Chamber of Commerce's Rules.

[18] The appellant claims that the Government of Madagascar and its D Ministry of Public Works, Transport and Meteorology are not beneficiaries under the bank guarantees. The appellant maintains that the beneficiary under the said guarantee is the Vice Premature.

[19] The respondents submitted that the appellant argument has no basis for E the following reasons:

(a) The appellant referred to the Government of Madagascar in at least one document as the 'Client/Government', thus acknowledging that the Government of Madagascar is the party to the contracts and the F beneficiary under the bank guarantees underlying the contracts.

(b) The ongoing disputes under the contracts are being arbitrated in Paris between the Government of Madagascar and the appellant. This is only possible because the Government of Madagascar is a party to the contracts and, as a consequence, the beneficiary under the bank G guarantees which the contracts underlie.

(c) The contracts very clearly state that they have been entered into by Vice Premature for and on behalf of the State of Madagascar. Hence, the Vice Premature clearly was not a party to the contracts but signed the contracts as agent of the Government of Madagascar. As the Vice Premature is only H agent of the Government of Madagascar under the contracts, it must follow that his name also appears in the bank guarantees as the agent of the Government of Madagascar. It is not possible for the Vice Premature to be named in the contracts and the bank guarantees under different I legal capacities as the purpose of the bank guarantees is to provide security to one of the parties under the contracts.

(d) In any event the Vice Premature has no legal or constitutional existence that is separate from the Government of Madagascar. Under the laws of Madagascar, the Vice Premature is part of the Government of Madagascar.

[20] The appellant submits that the bank guarantees are not assignable. The respondent rebuts that contention as there is no question of any assignment as the Government of Madagascar is the beneficiary under the bank guarantee.

[21] The appellant contends that the Government of Madagascar has failed to establish that the Republic of Madagascar is a foreign sovereign recognised by our Yang di-Pertuan Agong. The respondent answer to that was that the doctrine of sovereign immunity applies to the appellant cause of action and accordingly the Government of Madagascar cannot be impleaded in a foreign court unless it has submitted to that foreign jurisdiction.

[22] We agree with the decision of the High Court on the following grounds:

(a) The demands for payment under the performance guarantees are valid and effective and were made by the Minister of Public Works and Transport as agent of the Government of Madagascar, a party of the contract entered into with the appellant upon which the performance guarantees in question were issued. In law, the principal can act against the agent to make a demand on the guarantee.

(b) On the issue of sovereign immunity, the appellant had entered into the contracts with the Government of Madagascar with eyes wide open and full knowledge of its sovereign status.

[23] For the reasons above, for Appeal No W-02–1031 of 2006 we dismissed the appeal with costs and ordered the deposits for this appeal to be remitted to the respondent on account of taxed costs. For Appeal No W-02–341 of 2006, we dismissed the appeal with costs and ordered the deposit for this appeal to be remitted to the second respondent on account of taxed costs.

Appeals dismissed with costs.

Reported by Kanesh Sundrum